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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1252~~ 170

VIRTUE BROS., ANCHOR POST PRODUCTS, INC., of California, and CLAYTON MANUFACTURING COMPANY, *Petitioners,*

v.

THE COUNTY OF LOS ANGELES, THE CITY OF LOS ANGELES, and THE CITY OF WHITTIER, *Respondents.*

On Petition for a Writ of Certiorari to the California District Court of Appeal, Second District, Division II

RESPONDENTS' MEMORANDUM

HAROLD W. KENNEDY
GEORGE W. WAKEFIELD
Offices of The County Counsel
of Los Angeles County
500 West Temple Street
Los Angeles, Calif. 90012

JOHN GEYER TAUSIG
1000 Vermont Avenue, N. W.
Washington, D. C. 20005
Attorneys for Respondents

A. R. EARLY
Offices of the County
Counsel of Los Angeles County

BUTLER, KOEHLER & TAUSIG
1000 Vermont Avenue, N. W.
Washington, D. C. 20005
Of Counsel

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No. 1352

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v.

THE COUNTY OF LOS ANGELES, THE CITY OF LOS ANGELES, and THE CITY OF WHITTIER, *Respondents.*

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RESPONDENTS' MEMORANDUM

I.

In the cases at bar the California District Court of Appeal placed an entirely different interpretation on the "current operational needs" test enunciated in *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U.S. 534 (1959), than the interpretation given to said test by *The City and County of Denver* v. *Denver Publishing Co.,* 153 Colo. 539, 387 P.2d 48 (1963), and *Orr Felt & Blanket Co.* v. *Schneider,* 3 Ohio 2d 14, 209 N.W. 2d

150 (1965). Because of the novelty of the constitutional question raised by these conflicting state court decisions, and the importance to the taxpayers and taxing authorities in the State of California, as well as those in every other state, to have the question resolved, Respondents join the Petitioners in urging this Court to grant the Petition for Certiorari.

However, Respondents do not agree that the California District Court of Appeal construed *Youngstown's* "current operational needs" test in the manner represented in the Petition for Certiorari. That is, said construction does not omit "the last crucial element" of the test involved, as Petitioners claim. The District Court of Appeal did hold that "*Youngstown* requires that the full inventory [of imported plywood, steel tubing, and wire] in the possession of plaintiffs, committed to the purpose of manufacture, on the first Monday in March, is subject to tax." But, that holding is clearly based upon the premise that the full inventory had been "entered" and "used" in "manufacturing", in the sense that all of the taxed materials were required by plaintiffs' "current operational needs".

The District Court of Appeal found that since the materials in the cases at bar (1) "had reached the end of their importation journey", (2) "indiscriminate portions of the whole were actually being used to supply daily operating needs", and (3) all of the materials were purchased for use in manufacturing and in the normal course of events actually would be so used within a period of six months, the full inventory had been committed irrevocably to "use in manufacturing"; and, accordingly, held that the full inventory was required to meet "current operational needs" as that term is defined in *Youngstown.*

Therefore, Respondents submit that the District Court of Appeal correctly decided that the Import-Export Clause of the U. S. Constitution, Article I, § 10, cl. 2, does not interdict the tax here under attack. Respondents also submit that the decisions in *The City and County of Denver* v. *Denver Publishing Co., supra,* and *Orr Felt & Blanket Co.* v. *Schneider, supra,* are erroneous insofar as they construe *Youngstown* as holding that the Import-Export Clause prohibits a tax on imports to be used in manufacturing, unless such imports will be so used "before the time needed to secure a new supply [of similar imported materials] would elapse".

II.

In the cases at bar no material was imported for sale, before being incorporated in a manufactured article. Therefore, the distinction which the District Court of Appeal made between material imported for sale and material imported for manufacture is *dictum.* However, Respondents agree with Petitioners that if the "current operational needs" test set forth in *Youngstown,* as interpreted by the District Court of Appeal in the cases at bar, is valid as to imports for manufacture, it must be equally valid as to imports for sale. In other words, if imports for sale have reached the end of their importation journey, are stored in their original packages awaiting sale, some of those original packages are selected at random and removed from storage to consummate daily sales, and those remaining in storage actually will be sold in the reasonably near future, it is Respondents' position that the Import-Export Clause of the Constitution does not forbid the imposition of a state *ad valorem* personal

property tax upon the full inventory. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) does not hold otherwise. Certainly, such materials for sale are no less "incorporated and mixed up with the mass of property" within the State, than the materials for manufacture involved in the cases at bar.

If imports for sale, in the circumstances set forth in the preceding paragraph, are not subjected to the taxing power of California, it will not be because this State has violated the United States Constitution, Amendment 14, Section 1, Clause 4, by denying persons "within its jurisdiction the equal protection of the laws", but because the Supreme Court of the United States holds that the Import-Export Clause of the Constitution cannot be applied to merchandise imported for sale in the same manner as it has been applied to merchandise imported for manufacture.

Respectfully submitted,

HAROLD W. KENNEDY
GEORGE W. WAKEFIELD
JOHN GEYER TAUSIG
Attorneys for Respondents

A. R. EARLY

BUTLER, KOEHLER & TAUSIG

Of Counsel